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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 148.

REMINGTON RAND INC., *Intervenor-Petitioner*,

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A. etc. (Interhandel), *Plaintiff-Respondent*,

and

J. HOWARD MCGRATH, Attorney General of the United States as Successor to the Alien Property Custodian, and GEORGIA NEESE CLARK, Treasurer of the United States, *Defendants-Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

PETITION FOR REHEARING AFTER DENIAL OF CERTIORARI.

WILLIAM P. MACCRACKEN, JR.,
Attorney for Petitioner.

Of Counsel:
URBAN A. LAVERY,
WILLIAM W. BARRON,
FRANK C. STERCK.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable, the Associate Justices of the Supreme Court of the United States:

The petitioner, Remington Rand Inc., petitions for a rehearing after the denial of its petition for a writ of certiorari to the Court of Appeals for the District of Columbia Circuit.

This petition is based upon intervening facts and circumstances of substantial effect in compliance with Rule 33 of this Court.

1. The petition for a writ of certiorari was filed June 26, 1951. The petitioner's reply brief to the respondents' briefs in opposition was filed August 23, 1951. At that time and until September 28, 1951, there was before this Court the record in the case of *Gem Manufacturing Co.* v. *Packard Motor Car Co.,* 187 F. 2d 65 to review which this Court had granted its writ of certiorari on May 14, 1951, 341 U. S. 930 and which was No. 21 on the calendar of this Court at the October Term, 1951.

The only question involved in that case was the proper construction and application of Rule 54(b), Federal Rules of Civil Procedure, which has been a source of conflict and confusion in the courts of appeals and the district courts as is shown in our petition in the case at bar. (Pet. pp. 17-21) In the *Gem Manufacturing* case, the Court of Appeals of the Seventh Circuit applied Rule 54(b) in a manner directly in conflict with the application of the same rule to a similar issue by the Court below in this case.

On September 28, 1951, while the petition in the case at bar was before this Court for consideration, the case of *Gem Manufacturing Co.* v. *Packard Motor Car Co., supra,* was settled and a stipulation for dismissal was filed. Consequently there will be no decision upon the construction and effect of Rule 54(b) by this Court in that case.

Regardless whether the judgment in that case had been affirmed or reversed, this Court undoubtedly would have used language in its opinion delineating the scope and application of this rule, thereby disposing of some if not all of the questions relating to Rule 54(b) presented in the case at bar, as well as deciding the question left unsettled in the *Dickinson* case, 338 U. S. 507.

On October 15, 1951, this Court granted the petition of *Kaufman, et al.* v. *Interhandel, et al.,* for a writ of certiorari, No. 172, October Term, 1951, to review an order dis-

missing their petition for leave to intervene in the case at bar. That petition does not involve the clarification of Rule 54(b) as does our petition in No. 148. The order granting that petition does, however, effectively and conclusively preclude any early determination of the main case in which Remington Rand Inc., the petitioner here, seeks to establish its claim in intervention. In other words, our petition for rehearing cannot possibly produce any greater delay in the trial or settlement of the main action than has already been caused by the order granting the writ in No. 172.

3. June 25, 1951, the Minnesota Supreme Court adopted Rules of Procedure for the district courts of Minnesota effective January 1, 1952 (232 Minn. following p. 486). These rules were patterned after the Federal Rules of Civil Procedure and include Rule 3-54-2 and Rule 3-42 which are substantially identical with Rules 54 and 42 of the Federal Rules of Civil Procedure. The Minnesota Bar Association held an Institute in St. Paul, October 19, 20, 1951, to discuss procedure under the new rules. The bulletin of that association recognizes that until local precedents are available, the decisions of United States Courts under the Federal Rules of Civil Procedure will be the precedents to be followed.

This is not an unforseen development. The Advisory Committee and the proponents of a simplified procedure agreed that one of the important purposes to be accomplished by the rules was that they should serve as a model for adoption by the states. Only by general state adoption can true conformity in matters of procedure be attained.

Thus is made plain the importance of an early decision by this court announcing the proper construction of Rule 54(b) and deciding the questions presented by our petition; namely, whether an order or judgment dismissing a claim in intervention is appealable without an express finding that there is no just reason for delay as required by Rule 54(b) and whether such omission can be cured after a case

is at issue in the Court of Appeals by a *nunc pro tunc* order without permission of the appellate court.

The proper application of Rule 54(b) was left undecided by this Court in *Dickinson* v. *Petroleum Conversion Corporation*, 338 U. S. 507, as stated in our petition (p. 18) and the conflicting and confusing holdings of our courts of appeals are there discussed (pp. 17-20).

If No. 21, the case of *Gem Manufacturing Co.* v. *Packard Motor Car Co., supra*, had remained on the calendar for decision, the urgency of a clarifying opinion in the case at bar would not be so great. However as far as counsel has been able to ascertain, there is not now pending before this Court any other case involving Rule 54(b). Thus the instant case presents the only immediate opportunity for this Court to decide the important questions left unsettled. Until this is done, it will be impossible for the courts of those states which have adopted a rule similar to 54(b) to follow the conflicting decisions of the United States courts in their application of this rule.

The Court should not refuse review of any case involving a question of importance and difficulty in the correct interpretation of the Federal Rules of Civil Procedure as to which the courts of appeals and the district courts are utterly confused and which this Court has not yet settled. Trial courts and, on occasion, courts of appeals, may take a superficial view of questions of procedure and, by empirical devices, sanction evasions of the rules and departures from the practice prescribed by the rules. But this Court should not withhold its judgment upon questions of such far-reaching importance as those properly presented in the case at bar.

Conclusion.

We earnestly urge this Court to grant our motion for rehearing; to reconsider our petition for a writ of certiorari; and to grant the writ in order that the important questions of federal law, as yet unsettled, may be decided and that

the other errors pointed out in our petition and reply may be corrected.

Respectfully submitted,

WILLIAM P. MACCRACKEN, JR.,
Attorney for Petitioner.

Of Counsel:
URBAN A. LAVERY,
WILLIAM W. BARRON,
FRANK C. STERCK.

Certificate of Counsel.

I certify that I am counsel for petitioner and that the foregoing petition is presented in good faith and not for delay. I also certify that the petition is restricted to the grounds specified in Rule 33 as amended.

WILLIAM P. MACCRACKEN, JR.,
Attorney for Petitioner.

Washington, D. C.,
October 22, 1951.

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RESPONSE OF PLAINTIFF-RESPONDENT TO PETITION FOR REHEARING AFTER DENIAL OF CERTIORARI.

JOHN J. WILSON,
DONALD HISS,
Attorneys for Plaintiff-Respondent

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Societe Internationale Pour Participations, etc., plaintiff-respondent, submits that none of the three reasons advanced by Remington-Rand, Inc., in support of its petition

for rehearing after denial of certiorari satisfies the requirements of Rule 33 of this Court.

Petitioner's principal ground for rehearing (after denial of certiorari) is that since this Court has lost the opportunity to examine Rule 54(b) of the Federal Rules of Civil Procedure, because *Gem Manufacturing Co.* v. *Packard Motor Car Co.*, October Term 1951, No. 21 was dismissed by stipulation of the parties after the grant of certiorari, the Court should allow certiorari in the instant case, in which 54(b) is also involved.

Petitioner's thesis in effect is that this Court should construe the Rules whenever the chance to do so arises, in order to provide guides for other courts and lawyers, whether or not the question involved in the particular case deserves consideration.

Strangely enough, petitioner implies that if the *Gem Manufacturing* case had not been otherwise disposed of by the parties, there would be no ground for the instant petition to rehear.

Petitioner asserts that the Court of Appeals for the Seventh Circuit, in the *Gem Manufacturing* case, "applied Rule 54(b) in a manner directly in conflict with the application of the same rule to a similar issue by the Court below in this case." (Rehearing Pet., p. 2); and petitioner also contends that, absent the stipulation of dismissal, "this Court undoubtedly would have used language in its opinion delineating the scope and application of this rule, thereby disposing of some, if not all, of the questions relating to Rule 54(b) presented in the case at bar . . ." (Rehearing Pet., p. 2). These statements are made by petitioner, despite the fact that in its reply brief, petitioner conceded the lack of conflict between these two decisions, stating categorically that "a decision in the *Gem Manufacturing Co.* case will not be controlling as regards appeals under Section 1291, unless this Court should hold that Rule 54(b) is applicable to appeals under both sections 1291 and 1292(1). Even in that event the questions here presented

differ from those in the *Gem Manufacturing Co.* case because there no attempt was made to shore up the district court record by a *nunc pro tunc* order." (Reply Br., p. 15.)

The two cases are as unlike as night and day, and the questions respectively involved, as they relate to Rule 54(b), reflect instantly the presence of importance in the one and the lack in the other. In the *Gem Manufacturing* case the Circuit Court of Appeals had denied the maintenance of an appeal under 28 U.S.C. 1292(1) from an interlocutory order, where the District Judge had not made the determination and direction which are prescribed by Rule 54(b) in relation to a "final judgment" in a case involving multiple claims. 187 F. 2d 65. The very statement of this proposition establishes its importance.

In the case at bar, the judgment—dismissing a complaint in intervention after a full trial on the merits—was plainly inherently "final" in character, and petitioner lost nothing by the *nunc pro tunc* determination of the trial judge. Petitioner, as appellant in the court below, initially prosecuted its appeal in the absence of the determination in the record. Respondent, Societe, as appellee, before argument in the Court of Appeals brought about the *nunc pro tunc action* to aid—not to interfere with—petitioner's prosecution of its appeal. Petitioner's appeal was *not* dismissed or otherwise procedurally impeded.

The anomaly presented by the petitioner is as follows: It made timely prosecution of its appeal. It was not misled by Rule 54(b) to its prejudice. The Court of Appeals received and decided its appeal on the merits. Petitioner sought to destroy its own appeal, and complains because the Court of Appeals would not permit this to be done.

Petitioner refers to the grant of certiorari on October 15, 1951 in *Kaufman et al.* v. *Societe Internationale Pour Participations, etc. et al.*, October Term 1951, No. 172, as its second reason for rehearing, asserting that its petition for rehearing "cannot possibly produce any greater delay in the trial or settlement of the main action than has already

been caused by the order granting the writ in No. 172." (Rehearing Pet., p. 3.) Whether review by this court of petitioner's claim of intervention would delay settlement or trial of the main case is irrelevant to the merits of this petition. This is apparent from the fact that avoidance of delay has not been suggested by respondent as a reason for denying the petition.

Petitioner's irrelevant reference, as a third ground, to the adoption of rules of procedure by the Minnesota Supreme Court prompts the rhetorical question as to whether petitioner seeks, by such indirection, to aid itself or the State of Minnesota?

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for rehearing after denial of certiorari should be denied.

JOHN J. WILSON,
DONALD HISS,
Attorneys for Plaintiff-Respondent, Societe Internationale Pour Participations, Etc.

November 2, 1951